In the High Court of Judicature at Madras

Date : 07.12.2006

Coram :

The Hon'ble Mr. Justice A. KULASEKARAN

Second Appeal No: 707 of 2001

1. Yasoda Purushothaman
2. P. Jayasuriya ... Appellants

-vs-

V.N. Chandrasekaran ... Respondent

Second appeal under Section 100 of C.P.C. against the decree and judgment dated 30.08.2000 made in A.S. No: 56 of 1997 on the file of the III Additional Judge/City Civil Court, Chennai, confirming the decree and judgment of the First Assistant Judge, City Civil Court, Chennai, made in O.S. No: 4335 of 1994 dated 03.10.1996.

For appellants : M/s. M.V. Venkataseshan
For respondent : Mr. T.V. Ramanujam,
Senior counsel for
M/s. Vidya

J U D G M E N T

The unsuccessful defendant is the appellant herein. The respondent herein has filed a suit in O.S. No: 4335 of 1994 before the First Assistant City Civil Court, Chennai, for specific performace, which was decreed. The appeal filed in A.S. No: 56 of 1997 by the appellants before the 3rd Additional City Civil Judge, Madras, was also dismissed. Hence, the present second appeal.

2. The facts which are relevant for the disposal of this second appeal are as follows :-

" The respondent and the appellant entered into an agreement Ex.A.1 dated 26.05.1971 to sell the H.I.G plot for a total of Rs.85,000/-. On the date of execution of Ex.A.1 a sum of Rs.6,000/- was paid by the respondent herein in which a sum of

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Rs. 5,000/- was paid straight to the Housing Board and a sum of Rs.1,000/- was paid to the appellant as required by the appellant. Under Ex.A.2 dated 7.8.1971, the appellant also delivered vacant possession to the respondent. The sum of Rs. 71,104/- was paid by the respondents on various dates is evident from Ex.A.3. The appellants herein issued a notice to the respondents on 16.11.1988 under Ex.A.24, for the first time, terming the respondent as a lessee and calling upon the respondent to vacate and deliver possession. Therefore, a suit in O.S. No: 1509 of 1989 came to be filed by the respondent for mandatory injunction to direct the appellant herein to execute the sale deed. The said suit was dismissed. The appeal preferred by the respondents is A.S. No: 165 of 1994. Pending appeal, the respondents herein filed C.M.P. No: 250 of 1995 seeking permission to withdraw the suit which was allowed. It is also relevant to mention that even before filing the C.M.P. No: 250 of 1995 the respondent herein has filed the present suit in O.S. No: 4335 of 1994 for specific performance. The appellant herein contested the said suit by defending that the second suit is barred by resjudicata. As per the arrangement under Ex.A.1 the respondent failed to pay the amount payable to the Housing Board. Hence, the sale deed was not executed. With the above said contentions, the respondents herein marked Exs. A.1 to A.32 and the plaintiff examined himself as P.W.1. The appellants herein marked exhibits B.1 to B.15 and examined the third appellant herein as D.W.1."

3. The trial Court considered Ex.A.1, dated 26.05.1971, the agreement for sale entered into between the plaintiff and the defendant herein to sell the H.I.G. Plot for a total consideration of Rs.85,000/-; Ex.A.2 dated 07.08.1971 under which possession was delivered by the defendant to the plainitff; in Ex.A.3 dated 15.02.1972 the total amount of Rs.74,104/- was paid by the plaintiff was mentioned which was attested by the defendant in receipt of the said sum; Ex.A.24 notice dated 16.11.1988 was issued by the defendant's lawyer calling upon the plaintiff to vacate and hand over vacant possession on the ground that the defendant is a tenant and Ex.A.25 dated 23.01.1988 is the reply sent by the plaintiff's counsel denying the allegation that his client is a lessee and insisted the defendant to execute the sale deed as per Ex.A.1. It is also pertinent to mention here that since the defendant failed to execute the sale deed, the plaintiff filed a suit in O.S. No: 1509 of 1989 on the file of the 7th Assistant City Civil Court, Madras, for a mandatory injunction and the same was dismissed. While the appeal preferred in A.S. No: 165 of 1994 was pending, the plaintiff filed a miscellaneous petition in C.M.P. No: 250 of 1995 seeking permission to withdraw the suit and accordingly, the suit was dismissed as withdrawn. After the sale deed Ex.A.31 dated 30.05.1994 was executed by the Housing Board in favour of the defendant, the plaintiff filed the present suit on 8th June 1994. The trial Court pointed out that the first suit cannot be a bar since it was dismissed on

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the ground that there was no cause of action, but, after the execution of Ex.A.31, the appellant herein was bound to execute the sale deed in terms of Ex.A.1. It is also pointed out by the trial Court that under Ex.A.2 the appellant has delivered possession to the respondent herein and a total sum of rs.71,104/- had admittedly been paid to the appellant which is evident from Ex.A.3. Considering these facts, the trial Court decreed the suit as prayed for and directed the respondent herein to deposit the balance sum of Rs.17,352.50. It is submitted by the counsel for the respondent tha the said amount was also deposited to the credit of the suit. The first appellate Court confirmed the judgment and decree passed by the trial Court after taking into consideration the oral and documentary evidence.

4. The second appeal is admitted on the following substantial question of law :

> " 1. Whether the Courts below are right in decreeing the suit for specific performance of the respondent, when the present suit is barred by res judicata as held in the decision reported in A.I.R. 1997 S.C. 772 ?
>
> 2. Whether the Courts below are right in holding that the present suit is not hit by the provisions of Order 2 Rule 2 ? and
>
> 3. Whether the Courts below are right in decreeing the suit when the present suit is barred by limitation under Article 54 of the Indian Limitation Act 1963, as the agreement was terminated under Ex.A.24 on 16.11.1988?"

5. Mr.M.V. Venkata Seshan, learned counsel appearing for the appellant submitted that the present suit is barred by res judicata as in respect of the same issue, the respondent herein has filed a suit in O.S. No: 1509 of 1989 which was dismissed; that the present suit is hit by Order 2 Rule 2; that the first suit was filed for mandatory injunction alone without reserving his right and hence the second suit is not maintainable. The other argument of the learned counsel appearing for the appellant is that the agreement Ex.A.1 was terminated under Ex.A.24 notice dated 16.11.1988. The present suit was filed only on 08.06.1994 and hence on that score also the second suit is hopelessly barred by limitation under Article 54 of the Indian Limitation Act. Mr.M.V. Venkata Seshan, also contended that as per the agreement Ex.A.1, the respondent has not paid the amount to the Housing Board and hence, Ex.A.1 was terminated by Ex.A.24 notice. Finally, the learned counsel would submit that as all these aspects of the issue involved was not properly considered by the Courts below, he requested this Court to set aside those judgments by allowing this second appeal.

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6. Mr.T.V. Ramanujam, learned Senior Counsel appearing for the respondents submitted that the first suit in O.S. No: 1509 of 1989 was filed seeking a mandatory injunction since the appellant herein, under Ex.A.24 dated 16.11.1988, called upon the respondents to vacate and deliver vacant possession on the ground that he is a lessee. That suit was dismissed only on the ground that it is premature. Though initially the respondents filed A.S. No: 165 of 1994, a miscellaneous petition in C.M.P. No: 250 of 1995 was filed seeking permission to withdraw the said suit and that the present suit was filed on 08.06.1994. According to the learned senior counsel since the first appellate Court has disposed of A.S. No: 165 of 1994 granting permission to the respondent to withdraw the earlier suit, the present suit is perfectly valid in law. The learned senior counsel for the respondents would further submit that as per Ex.A.1, the appellant is bound to execute the sale deed only after obtaining the sale deed from the Housing Board. But when the appellant attempted to vacate the respondent from the premises, the earlier suit for mandatory injunction came to be filed which was later on withdrawn. The present suit is filed on the basis of a different cause of action namely, the Housing Board has executed a sale deed on 30.5.1994 and as per the terms of Ex.A.1, the apellant has to execute the sale deed in favour of the respondents and hence, the present suit is filed for specific performance. According to the learned senior counsel both the suits stand on a different cause of action and therefore, the application of Order 2 Rule 2 does not arise at all in this case. Mr.T.V.Ramanujam, learned senior counsel would further submit that the principle governing the application of Order 2 Rule 2 is where the claim in the new suit is in fact founded upon a cause of action distinct from that which was founded upon for the former suit and in this case, the cause of action for the second suit is different and distinct from that of the first suit and hence, it is not hit by Order 2 Rule 2.

7. It is further submitted by Mr.T.V. Ramanujam, that as per Ex.A.1 the appellant has to execute the sale deed only after obtaining the sale deed from the Housing Board. As that sale deed was executed in favour of the appellant on 30.05.1994, on that day, the cause of action arose and thus, the present suit which is filed on 08.06.1994 is well within time even by application of Article 54 of the Indian Limitation Act. Learned senior counsel would also further point out that the defendant had received the major portion of the agreed amounts on various dates is evident from Ex.A.3 dated 15.02.1972 and even prior to the said date, possession was delivered to the plaintiff, namely on 01.08.1971, is evident from Ex.A.2. According to him the Courts below, only after taking into consideration these facts, have rightly granted the relief sought for by the plaintiff and prayed for dismissal of this second appeal.

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8. This Court heard the arguments of the learned counsel on either side and perused the materials on record. The plaintiff and the defendant entered into an agreement for sale under Ex.A.1 dated 26.05.1971. It is agreed between the parties that after execution of the sale deed by the Housing Board, the appellant has to execute the sale deed in favour of the respondent. On 01.08.1971 possession was also delivered to the respondent is evident from Ex.A.2. Admittedly, the plaintiff has paid a sum of Rs.71,104/- is evident from Ex.A.3. The dispute arose between the parties when Ex.A.24 notice dated 16.11.1988 was issued by the respondent through his advocate. In the said notice, the appellant had, for the first time, terms the respondent as a lessee. It is also admitted position that in Ex.A.24, the sale agreement Ex.A.1 was not referred to at all. Pointing out this supression, the respondent issued a reply notice Ex.A.25 on 23.11.1988 calling upon the appellant to fulfill the terms of the agreement Ex.A.1. In view of the stand taken by the appellant in Ex.A.24, the respondent filed a suit in O.S. No: 1509 of 1989 for mandatory injunction to direct the appellant herein to execute the sale deed. Considering the contents of Ex.A.1, the trial Court dismissed that suit on the ground that there is no cause of action at all for filing the said suit. Pending appeal, viz. A.S. No: 165 of 1994, the miscellaneous petition filed by the respondent seeking permission to withdraw the suit was allowed on the ground that the respondent has filed a fresh suit in O.S. No: 4335 of 1994. It is also an admitted position that against the order passed in A.S. No: 165 of 1994, the appellant herein has not choosen to file any appeal and hence, it reached a finality.

9. According to Section 11 of the Code of Civil Procedure, in order to apply the general principle of res judicata, the Court is required to find whether the issue in a subsequent suit was directly and substantially in issue in the earlier suit or proceeding, was it between the same parties and was it decided by such Court. Section 11 also further emphasis that before a plea of res judicata can be given effect, the following conditions must be proved :

> "(1) that the litigating parties must be the same; (2) that the subject matter of the suit also must be identical; (3) that the matter must be finally decided between the parties and (4) that the suit must be decided by a court of competent jurisdiction."

Thus, it is for the appellant to establish that the issue involved in the previous suit was adjudicated or finally decided by the Courts. With this in mind, when we look into the order passed by the trial Court in O.S. No: 1509 of 1989, it is seen that the suit was dismissed on the ground that it is pre-mature and ofcourse, A.S. No: 165 of 1994 filed by the respondent herein against the judgment and decree made in O.S. No: 1509 of 1989 was permitted to be withdrawn. In view of this fact that the issue involved was not finally decided by the Courts, the principles of res

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judicata cannot be made applicable in this case. The one another angle to look into this issue is that, the first appellate Court had permitted the respondent herein to withdraw the suit without adjudicating the appeal in A.S. No: 165 of 1994, ofcourse on an application filed by the respondent. That order of the first appellate Court had reached finality since the appellant has not chosen to file any appeal against that order. For these two reasons, this Court is of the view that the second suit is not hit by the principles of res judicata. Accordingly, the first substantial question of law is answered agains the appellant.

10. The second substantial question of law is whether the second suit is hit by provisions of Order 2 Rule 2. As rightly pointed out by Mr.T.V. Ramanujam, learned Senior counsel, the principles governing the application of Order 2 Rule 2 are (1) where the claim in the new suit is in fact founded upon a cause of action distinct from that which was founded upon for the former suit, (2) whether the cause of action for the second suit is different and distinct from that of the first suit, (3) if the evidence to support both the claims is different, then the cause of action for both the claims is also different and (4) if there is any independent contract especially when the cause of action has no relation whatsoever to the defence that may be set up by the defendant in order to decide the character or the relief prayed for by the plaintiff. By applying the above said tests, when this Court looks into the facts of the present case, it is clear that the present suit is not hit by Order 2 Rule 2. Hence, the second substantial question of law is also answered against the appellant.

11. The third substantial question of law is whether the present suit is barred by limitation under Article 54 of the Indian Limitation Act ?. Article 54 of the Indian Limitation Act prescribes three years as the period of limitation for a suit for specific performance of a contract. This Article also prescribes the time from which period beings to run namely, the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. In Ex.A.1, it is agreed between the plaintiff and the defendant that on execution of the sale deed by the Housing Board in favour of the defendant, the defendant shall execute the sale deed in favour of the plaintiff. The sale deed in favour of the defendant was executed by the Housing Board on 30.05.1974 is evident from Ex.A.31. The present suit is filed on 08.06.1994. Therefore, the period of three years contemplated under Article 54 of the Indian Limitation Act, is the date fixed for performace or if no such date is fixed when the plaintiff has notice that performance is refused. Since in the case on hand, the date is fixed, namely, on execution of the sale deed by the housing board, the question of the plaintiff coming to know about the refusal of the performance as contemplated by Article 54 does not arise. As mentioned above, within a period of 8 days from the date on which the housing board executed the sale deed, Ex.A.31, in favour of the defendant, the plaintiff has filed the present suit. Thus, this Court holds that the present suit is clearly within the time prescribed by the

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Limitation Act and accordingly, the third substantial question of law is also answered against the appellants.

12. In view of the discussions above and also the concurrent findings of the Courts below that the respondent is entitled to the relief sought for, this Court, finds no reason to interfere with the well considered judgment and decree passed by the Courts below. In the result, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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Copy to :

1. The III Additional Judge,
City Civil Court,
Chennai.

2. The I Assistant Judge,
City Civil Court,
Chennai.

3. The Section Officer,
V.R.Section, High Court, Madras

1 cc To Mr.M.V.Venkata Seshan, Advocate, SR.60675.
1 cc To Mrs.M.Vidya, Advocate, SR.60805.

S.A. No: 707 of 2001

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